2017 IL App (1st) 152917-U

No. 1-15-2917

Order filed December 15, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 19003
	)	
ANTOINE LACY,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** Because the affidavit supporting defendant's postconviction claim of actual innocence is not of such conclusive character that it would probably change the result if a new trial were granted, the circuit court did not err in summarily dismissing the petition.

¶ 2 Defendant Antoine Lacy, who was convicted of first degree murder, appeals from the circuit court's summary dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2014). On appeal, defendant contends that the

court erred in failing to consider an attached affidavit from a codefendant who averred that defendant had nothing to do with the shooting of the victim, and thus raised a claim of actual innocence that was ignored by the court. Defendant seeks a remand for new first-stage proceedings. We affirm.

¶ 3 Defendant's conviction arose from the September 1, 2008, shooting death of 10-year-old Nequiel Fowler in Chicago. Following their arrest, defendant and codefendants Luis Pena, Raymond Jones, and Joseph Chico were charged with first degree murder. The indictment alleged that all four defendants were armed with firearms and that Pena personally discharged a firearm causing Fowler's death. Chico pled guilty to conspiracy to commit murder in exchange for his testimony against defendant, Pena, and Jones. Defendant's attorney filed a motion to suppress statements, which the court denied. Thereafter, defendant was tried simultaneously with Pena and Jones before three separate juries. Defendant was convicted and sentenced to 60 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Lacy*, 2014 IL App (1st) 120655-U. Due to the nature of defendant's current claim, the facts will be repeated here in some detail.

¶ 4 The evidence at trial established that on the day in question, Fowler was playing outside near 87th Street and Exchange Avenue with her blind younger sister. About 4:30 p.m., a man in the gangway between Exchange Avenue and Escanaba Avenue yelled "King killer" and shots were fired. After the shooting stopped, Fowler was found on the ground, shot. The medical examiner who performed Fowler's autopsy recovered a bullet from her lung. The examiner testified that Fowler's cause of death was a gunshot wound to the chest and the manner of death was homicide.

¶ 5 Joseph Chico testified that in September 2008, he was a member of the Latin Dragons, a gang that claimed the area of 87th Street and Escanaba Avenue as their territory. According to Chico, during that time, the Latin Kings claimed control of an area a block away, at 87th and Exchange. The two gangs were rivals, hostile to the point that Dragons would kill Kings on sight. Chico explained that defendant and Pena were also members of the Dragons, and while Jones was not a member, he lived near 87th and Escanaba and would hang out with Dragons.

¶ 6 Chico testified that on the morning of September 1, 2008, he picked up Pena and defendant and drove them to 87th and Escanaba because it was "mandatory Monday," which he explained was "a day where Dragons are supposed to be out in the neighborhood to show their strength." During the drive, defendant called another Dragon to arrange obtaining a gun, and then told Chico and Pena that Jones had a gun. About 2 or 3 p.m., the group arrived in the area of 87th and Escanaba. While Chico parked by a restaurant, defendant and Pena went to Jones's house. Defendant then left in a car with another man to go to 87th and Exchange. Defendant called Chico to report that, when he and the other man drove past Exchange, he saw three Kings, one of whom he knew as Baloney. Less than a minute later, the car defendant was riding in pulled up by Chico and defendant got out. Defendant told Chico that "he got some N***s in the dip," which Chico explained in court meant Pena and Jones were in the gangway by Jones's house with a gun.

¶ 7 Chico testified that he and defendant walked together to the gangway. Along the way, they passed an old man sitting on Jones's front porch. In the backyard of Jones's house, Chico and defendant met up with Jones and Pena. Defendant told Pena, who was wearing a royal blue shirt, "to go fire the Kings up that they're out there." Jones said that he thought the Kings might have seen him earlier, so he went inside to change. A few minutes later, Jones came outside in

different clothes. After Jones returned, Chico and defendant walked back through the gangway toward Chico's car, leaving Pena and Jones in Jones's backyard. As Chico and defendant were walking out of the gangway, Chico heard five gunshots coming from the alley between Exchange and Escanaba. Chico and defendant got into Chico's car. Defendant told Chico to wait for Pena, so Chico drove around the corner onto 87th Street and pulled over. About two or three minutes later, Pena emerged from a nearby alley, now wearing a white t-shirt. Pena got in the car, and Chico drove the group to defendant's house.

¶ 8 On cross-examination, Chico agreed that on the day in question, he "had a problem with" defendant, as defendant had slept with Chico's girlfriend. He also acknowledged that he initially lied to the police, but eventually agreed to plead guilty to a charge of conspiracy to commit murder in exchange for a sentence of 14 years, which he would not receive until after testifying against his codefendants.

¶ 9 Jones's father, Joseph Slomka, testified that on the day in question, he and his son lived at 8731 South Escanaba Avenue. About 4 p.m., Slomka was sitting in front of his house when he saw defendant, Jones, Pena, and Chico talking in front of the house. As Slomka watched, the group walked through the gangway alongside the house to the backyard. After some time, defendant and Chico came back through the gangway and walked off toward 87th. Thereafter, Slomka heard four or five gunshots coming from the alley behind the house. Slomka jumped up, looked down the gangway, and saw Pena coming from the alley into the backyard, holding a "blue rag or something." Pena approached Jones, shoved the blue rag at his chest, and threatened Jones if he did not take it. Pena then walked off toward 87th. Finally, Slomka testified that a few days earlier, Jones had shown him a loaded handgun at the house. Slomka told Jones "to get that shit out of here." Slomka identified the handgun in court.

¶ 10 Luis Vega, Pena's cousin and a fellow Latin Dragon, testified that on the date in question, he lived with defendant in a Chicago suburb. Around 11 a.m. or noon that day, Chico and Pena arrived at Vega's and defendant's house. After a short time, defendant, Chico, and Pena left together in Chico's car. Later, around 5 or 6 p.m., defendant, Chico, and Pena returned together. After 10 or 15 minutes, Chico and Pena left. Thereafter, at defendant's request, Vega called Elise Padilla, a family friend who was a Chicago police officer, and defendant spoke with the officer on the phone.

¶ 11 Chicago police detective Michelle Moore Grose testified that she spoke with Jones at the scene and received a physical description of a possible offender from him. Later in the day, she learned that Officer Elise Padilla had information regarding the shooting. That evening, Moore Grose and her partner went to Calumet City, where they met with Padilla and defendant. Defendant told Moore Grose that earlier in the day, he, Chico, and Pena went to the 8700 block of Escanaba because it was what the Latin Dragons called "mandatory Monday." Defendant related that after Chico parked, the three of them walked to Jones's house. While defendant and Chico waited out front, Pena went into the house to retrieve a gun. Defendant then received a "chirp" on his phone from Pena, reporting that there were Latin Kings outside on the 8700 block of Exchange, including a man called "Baloney." Pena told defendant he was going to shoot at the Kings, and defendant told Pena to be careful, because the Kings also had guns. Defendant told Moore Grose that he decided to leave the area, and that as he and Chico were heading down the block, he heard gunfire. Defendant and Chico got into Chico's car and waited for Pena. After Pena joined them, they drove away. Defendant told Moore Grose that he decided to contact the police with information because he wanted to help out in the investigation after he found out a little girl had been shot.

¶ 12 Moore Grose testified that after speaking with defendant, she went back to Jones's house, spoke with him, and placed him under arrest. She and her partner then searched Jones's house with his mother's consent. During the search, Moore Grose found a gun and a blue t-shirt. An evidence technician was called to recover those items.

¶ 13 The State introduced evidence that the evidence technician recovered the t-shirt and loaded handgun, removed the magazine and two live rounds from the gun, and inventoried the shirt, gun, magazine, and bullets. A forensic investigator called to the scene recovered a fired bullet and four cartridge cases from the ground to the side of a house at 8728 South Exchange, as well as a bullet from the railing of that house's steps. Gunshot residue was found on the interior and exterior of the blue t-shirt, and Pena could not be excluded as the source of DNA extracted from the shirt. The four recovered cartridge cases, the two bullets recovered from the scene, and the bullet recovered from the victim's body were all determined to have been fired from the recovered gun. Finally, a fingerprint found on the recovered magazine matched Jones.

¶ 14 The jury found defendant guilty of first degree murder, but also found that the State had not proven the allegation that defendant was armed with a firearm during the commission of the offense. Defendant filed a motion for a new trial, which the trial court denied. The trial court subsequently sentenced defendant to 60 years in prison and denied defendant's motion to reconsider sentence.

¶ 15 On direct appeal, defendant contended that the trial court erred by considering an element inherent in the offense as an aggravating factor at sentencing. We rejected defendant's contention and affirmed his conviction and sentence. *People v. Lacy*, 2014 IL App (1st) 120655-U.

¶ 16 On March 4, 2015, defendant filed the *pro se* postconviction petition at issue in this appeal.[1] In the petition, defendant made nine claims, several of which relate to potentially exculpatory testimony of Jones.

¶ 17 Defendant attached an affidavit executed by Jones, in which Jones stated, among other things, that "On September 1, 2008, I was outside playing and [defendant] was outside also doing nothing but just standing." Jones stated that when he was questioned by the police, he "made a false statement implicating [defendant] in the crimes the detectives referenced." Jones further averred as follows:

> "6. I willfully lied about [defendant] standing in the backyard of my apartment.
>
> 7. I knowingly and willfully lied about [defendant] giving any orders to go and shoot or 'light up' any members of the Latin Kings street gang. I at no time witnessed [defendant] do or say anything illegal.
>
> 8. [Defendant] had nothing to do with this murder of Nequiel Fowler.
>
> 9. I implicated [defendant] falsely out of fear and duress of area 2 police detectives' history of police torture of suspects."

¶ 18 The court summarily dismissed defendant's petition as frivolous and patently without merit. This appeal followed.

[1] Two pages of the *pro se* petition, presumably hand-numbered 43 and 44, are not included in the record on appeal. While it does not appear that the absence of these pages hinders our review, we note that defendant, as the appellant, has the burden of presenting this court with a record which is sufficient to support his claims of error, and any doubts or deficiencies arising from an incomplete record will be construed against him. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984).

¶ 19 The Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). This case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 20 A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Id.* A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Id.* at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9. We review the trial court's judgment, not the reasons given for it. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 21 On appeal, defendant contends that the court erred in summarily dismissing his petition without considering Jones's affidavit, which, he asserts, raised a claim of actual innocence that was ignored by the court. Defendant acknowledges that his petition "did not explicitly make an actual innocence argument," but asserts that he "provided the limited factual detail needed to satisfy the low threshold applied at this stage of the proceeding" and that the trial court "should have considered the actual innocence claim raised by the factual allegations contained in Jones's affidavit." Defendant takes issue with the court's "mistaken" assertion that he had not submitted affidavits from any witnesses with his petition. Defendant argues that because the court failed to

notice the Jones affidavit, and, by extension, the claim of actual innocence contained in it, this court should remand the petition so that the court can consider the petition in its entirety and make a new first-stage determination as to whether it states the gist of a claim of actual innocence.

¶ 22 As an initial matter, we note the State's argument that because defendant did not include an actual innocence claim in his petition, it is forfeited. See 725 ILCS 5/122-3 (West 2014) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). We agree with the State that there is no question defendant never made an outright assertion in his petition that he is actually innocent. However, defendant did state in his petition that Jones's potential "testimony would have corroborated that [defendant] had nothing to do with or had no involvement in the shooting death of Fowler." In our view, it is arguable that in this statement, defendant was inartfully asserting his own innocence and then referencing Jones for corroboration of that assertion. As such, we decline to apply forfeiture.

¶ 23 A postconviction petitioner may assert a claim of actual innocence where the claim is based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Such evidence must be newly discovered, material and not cumulative, and, most importantly, of such conclusive character that it would probably change the result on retrial. *Id.*; *People v. Coleman*, 2013 IL 113307, ¶ 84. Evidence is considered new where it was discovered after trial and could not have been discovered earlier through the exercise of due diligence; material where it is relevant and probative of the petitioner's innocence; noncumulative where it adds to what the jury heard; and conclusive where, when considered along with the trial evidence, it would probably lead to a different result. *Coleman*, 2013 IL 113307 ¶ 96.

¶ 24 Here, we need not address the parties' arguments regarding whether Jones's potential testimony is newly discovered, material, or noncumulative. This is because defendant fails to meet the requirement that the supporting evidence must be so conclusive that, when considered along with the trial evidence, it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶¶ 84, 96.

¶ 25 Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Green*, 2012 IL App (4th) 101034, ¶ 36; *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40. Here, in the affidavit's specific references to defendant, Jones averred that on the day in question, defendant was "outside also doing nothing but just standing," that Jones "made a false statement implicating [defendant] in the crimes the detectives referenced," that Jones "willfully lied about [defendant] standing in the backyard of my apartment," that Jones "knowingly and willfully lied about [defendant] giving any orders to go and shoot or 'light up' any members of the Latin Kings street gang [and] at no time witnessed [defendant] do or say anything illegal," that defendant "had nothing to do with this murder," and that Jones "implicated [defendant] falsely out of fear and duress." Critically, Jones did not assert in his affidavit that defendant was not present when the shooting was being planned or when the shooting took place. Because defendant was convicted under a theory of accountability, Jones's affidavit does not exonerate him. See *People v. Edwards*, 2012 IL 111711, ¶¶ 39-40 (finding that a co-offender's affidavit stating that the defendant "had nothing to do with this shooting" and was neither "a part [of nor] took part in this crime" was not exonerating because it did not indicate the defendant was not present during the crime).

¶ 26 Moreover, key aspects of Jones's proposed testimony are contradicted by the evidence presented at trial. Jones's own father, Joseph Slomka, testified that he saw defendant, Jones,

Pena, and Chico talking in front of his house; that the group walked through the gangway alongside the house to the backyard; and that soon thereafter, defendant and Chico walked off and four or five gunshots were fired from the alley behind the house. Chico testified consistently with Slomka that he, defendant, Pena, and Jones gathered in Jones's backyard. In addition, Chico testified that while the group was in the backyard, defendant directed Pena to shoot at nearby rival gang members. After shots were fired and Chico and defendant got into Chico's car, defendant told Chico to wait for Pena. When Chico emerged from an alley and got into the car, Chico then drove defendant and Pena to defendant's house. Finally, defendant himself related to a detective that he waited outside Jones's house while Pena went inside to get a gun; that when Pena phoned him to say he was going to shoot at rival gang members, he told Pena to be careful; and that after defendant heard gunshots, he waited in Chico's car for Pena and then they all drove away from the scene together.

¶ 27 Given this overwhelming evidence of guilt, we cannot find that Jones's affidavit is of such a conclusive character that it would probably lead to a different result were there a retrial. See *People v. Harris*, 206 Ill. 2d 293, 300-02 (2002) (where the State had presented overwhelming evidence of the defendant's guilt, two codefendants' affidavits stating that the defendant was not present at the time of the crime and that the codefendants had conspired to frame the defendant were not of such a conclusive character that they would probably change the outcome on retrial); *People v. Mabrey*, 2016 IL App (1st) 141359, ¶¶ 15, 30 (finding, where the affiant stated that the defendant had "take[n] the fall for something he didn't do" and identified the defendant's accuser as the true murderer, that the affidavit would merely conflict with the defendant's confession and the eyewitness testimony and would not arguably exonerate the defendant as required for a postconviction claim of actual innocence); *People v. Walker*, 2015 IL

App (1st) 130530, ¶¶ 5, 24 (where an affidavit giving the name of someone other than the defendant as the actual shooter directly contradicted the record, the evidence was not of such a conclusive character that it would probably change the result of retrial).

¶ 28 We are mindful of defendant's argument that because the trial court apparently overlooked the Jones affidavit, it would be premature for this court to determine whether his claim "meet[s] the requirements of actual innocence," and that instead, we should remand to the trial court for a new first-stage review during which it would examine the entire petition, including the affidavit. In making this argument, defendant relies on this court's decisions in *People v. Sparks*, 393 Ill. App. 3d 878 (2009), and *People v. Munoz*, 406 Ill. App. 3d 844 (2010). Neither case dictates the result defendant seeks. In each case, the court found that the affidavit at issue was new, material, noncumulative, and could have changed the result of the defendant's trial. *Sparks*, 393 Ill. App. 3d at 886-87; *Munoz*, 406 Ill. App. 3d at 855-56.

¶ 29 Here, we have also assessed the affidavit in question, but in contrast to *Sparks* and *Munoz*, we have determined that it is not of such conclusive character that it would probably change the result of a new trial. As such, reversal is not justified. Furthermore, we note that neither the *Sparks* court nor the *Munoz* court remanded for new first-stage proceedings, which is the relief defendant seeks here. Because our review of a first-stage dismissal is *de novo*, we review the trial court's judgment, not the reasons given for it. See *Hodges*, 234 Ill. 2d at 9; *Jones*, 399 Ill. App. 3d at 359. Therefore, even assuming the circuit court overlooked Jones's affidavit, we are not precluded from finding that the court was nevertheless correct in finding the petition frivolous and patently without merit. Even if we were to find Jones's affidavit to constitute newly discovered evidence, it is not of such conclusive character that it would probably change the result if a new trial were granted. Therefore, defendant's claim of actual

innocence is founded on a legal theory that is belied by the record and has no arguable basis. See *Hodges*, 234 Ill. 2d at 16; see also *Sparks*, 393 Ill. App. 3d at 884 (where a defendant claims he set forth the gist of a meritorious claim of actual innocence based on newly discovered evidence, the question before the appellate court is whether the petition had no arguable basis either in law or in fact). Accordingly, the circuit court did not err in summarily dismissing the petition.

¶ 30 Affirmed.